

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL
74-2529

United States Court of Appeals
For the Second Circuit.

JAMES L. MCCARTHY, HUBERTA MCCARTHY, PETER F. FAY
and SHARON L. FAY,

Plaintiffs,

SHARON L. and PETER F. FAY,

Plaintiffs-Appellants,

against

EAST AFRICAN AIRWAYS CORPORATION, BRITISH AIRCRAFT
CORPORATION, LTD., BRITISH AIRCRAFT CORPORATION
(COMMERCIAL AIRCRAFT), LTD., BRITISH AIRCRAFT CORPORA-
TION (OPERATING), LTD., BRITISH AIRCRAFT CORPORATION
(U. S. A.), INC., DUNLOP LIMITED, DUNLOP HOLDINGS,
DUNLOP CO. OF GREAT BRITAIN and BRITISH OVER-
SEAS AIRWAYS CORPORATION, now known as BRITISH
AIRWAYS,

Defendants,

EAST AFRICAN AIRWAYS CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

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JAMES J. SULLIVAN,
KREINDLER & KREINDLER,

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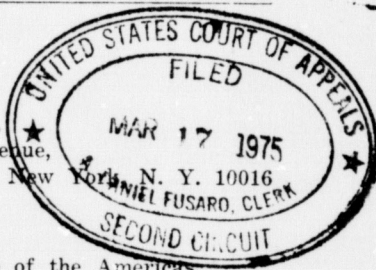
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United States Court of Appeals

FOR THE SECOND CIRCUIT.

JAMES L. MCCARTHY, HUBERTA MCCARTHY, PETER F. FAY
and SHARON L. FAY,

Plaintiffs,

SHARON AND PETER FAY,

Plaintiffs-Appellants,

against

EAST AFRICAN AIRWAYS CORPORATION, BRITISH AIRCRAFT
CORPORATION, Ltd., BRITISH AIRCRAFT CORPORATION (Com-
mercial Aircraft), Ltd., BRITISH AIRCRAFT CORPORATION
(Operating), Ltd., BRITISH AIRCRAFT CORPORATION
(U.S.A.), Inc., DUNLOP LIMITED, DUNLOP HOLDINGS,
DUNLOP CO. OF GREAT BRITAIN and BRITISH OVERSEAS
AIRWAYS CORPORATION, now known as British Airways,

Defendants,

EAST AFRICAN AIRWAYS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of New York.

Relevant Docket Entries.

Date

Proceedings

1973

June 11	Filed plaintiffs amended complaint
July 2	Filed defendant East African Airways Corp. Answer to the amended complaint.

Amended Complaint

1974

- Jan. 17 Filed defendant's (East African) request for admissions.
- Jan. 25 Filed plaintiffs' (Fay) responses to requests for admissions.
- Feb. 6 Filed Deft. East African Airways Corp. Notice of Motion. Re: Dismiss Amended Complaint. Ret. 2/15/74
- May 20 Filed Pltffs' Affidavit in opposition to Deft. (East African Airways) Motion
- Oct. 17 Filed Opinion #41318 Deft. East African Airways Corp. motion to dismiss this action as to pltffs. Peter and Sharon Fay is granted. So Ordered. Owen J. (Mailed notice)
- Nov. 14 Pltffs.' (Fay) Notice of Appeal

Amended Complaint.

Plaintiffs, by their attorneys, Kreindler & Kreindler, complaining of the defendants, respectfully allege:

A FIRST CLAIM AGAINST DEFENDANT EAST AFRICAN AIRWAYS CORPORATION ON BEHALF OF JAMES L. MCCARTHY AND HUBERTA MCCARTHY

FIRST: Jurisdiction exists pursuant to 28 United States Code §1332 in that, at all times mentioned, plaintiffs James L. McCarthy and Huberta McCarthy were and presently are citizens and residents of the State of California; plaintiffs Peter F. Fay and Sharon L. Fay were and presently are citizens and residents of the State of New York; defendant East African Airways Corporation (hereinafter referred to as "East African") was and presently is a multi-national corporation duly organized

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and existing under and by virtue of the laws of and with its principal place of business in, the East African Community, consisting of the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda and with its principal office and place of business in the United States in the City, County and State of New York; defendants British Aircraft Corporation, Ltd. (hereinafter referred to as "BAC-LTD."), British Aircraft Corporation (Commercial Aircraft) Ltd. (hereinafter referred to as "BAC-Commercial Aircraft") and British Aircraft Corporation (Operating) Ltd. (hereinafter referred to as "BAC-Operating") were and presently are corporations organized and existing under the laws of the United Kingdom and doing business in the State of New York; defendant British Aircraft Corporation (U.S.A.) Inc. (hereinafter referred to as "BAC-USA") is a corporation duly organized and existing under the laws of the State of Delaware, is authorized and is doing business as agent of BAC-Ltd., BAC-Commercial Aircraft and BAC-Operating in the State of New York; defendants Dunlop Limited, Dunlop Holdings, Ltd. and Dunlop Co. of Great Britain (hereinafter referred to as defendants "Dunlop") are corporations organized and existing under the laws of the United Kingdom and doing business in the State of New York, and are also doing business in the State of New York by its agent, Dunlop Tire and Rubber Corporation, a corporation duly organized and existing under the laws of the State of New York with its principal place of business in the State of New York; defendant British Overseas Airways Corporation (hereinafter referred to as defendant "BOAC") is a corporation duly organized and existing under the laws of Great Britain, qualified to do business in New York and with its principal office and place of business in the United States located in the City, County and State of New York; and the amount in controversy in each claim exceeds \$10,000, exclusive of interest and costs.

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SECOND: On April 18, 1972 and prior thereto, defendants BAC-LTD., BAC-Commercial Aircraft, BAC-Operating and/or BAC-USA were the owners of a certain British Aircraft Corporation VC-10 Type 1154 jet aircraft, Registration No. 5X-UVA, which had been leased by defendants British Aircraft Corporation to defendant East African Airways Corporation.

THIRD: At all times mentioned, defendant East African was a common carrier engaged in the business of transportation of passengers by aircraft for valuable consideration in connection with which it operated, maintained and controlled a certain British Aircraft Corporation VC-10 Type 1154 jet aircraft, Registration No. 5X-UVA, leased from British Aircraft Corporation and designated to operate from Nairobi, Kenya to London, England, via Addis Ababa, Ethiopia and Rome, Italy on the 18th day of April, 1972.

FOURTH: On or about the 5th day of April, 1972, plaintiff James L. McCarthy for valuable consideration purchased in San Francisco, California, a ticket which provided for passage from Marin, California to Addis Ababa, Ethiopia and return.

FIFTH: On the 18th day of April, 1972, plaintiff James L. McCarthy was a passenger for hire on said aircraft pursuant to said ticket on a flight from Addis Ababa, Ethiopia, the place of departure, to Marin, California, the place of destination, with an agreed stopping place in London, England.

SIXTH: On the 18th day of April, 1972, said aircraft crashed on take-off at Haile Selassie I International Airport, Addis Ababa, Ethiopia on a flight from Nairobi, Kenya to London, England, via Addis Ababa, Ethiopia and Rome, Italy.

Amended Complaint

SEVENTH: Said crash caused plaintiff James L. McCarthy personal injuries.

EIGHTH: At all times mentioned, the United States of America, Ethiopia and the East African Community, consisting of the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda were and are High Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Transportation By Air, known as the Warsaw Convention, Treaty Series, No. 876, 49 Stat. 3006.

NINTH: Prior to the times mentioned, defendant East African filed a tariff and agreement, also known as the Montreal Concorde, with the United States of America's Civil Aeronautics Board which approved said tariff and agreement in CAB No. 18900 and Order No. E-23680, 31 Fed. Reg. 7302 (1967), all of which were in valid force and effect at all times mentioned.

TENTH: Said passage provided for by said ticket and said flight were "international transportation" as defined by Article 1 of said Warsaw Convention.

ELEVENTH: On the 18th day of April, 1972, defendant East African accepted plaintiff as a passenger for hire aboard said aircraft without delivering to him a ticket containing a statement that the transportation was subject to the rules relating to the liability established by the Warsaw Convention or in appropriate and proper form as required by Article 3.

TWELFTH: By reason of the premises, and Article 3, defendant East African is not entitled to avail itself of those provisions the Warsaw Convention which exclude or limit its liability.

THIRTEENTH: By reason of the aforesaid, plaintiff James L. McCarthy has suffered and continues to suffer great physical and mental pain and anguish, was se-

Amended Complaint

riously and permanently injured, and has incurred and continues to incur medical and other expenses and was otherwise damaged.

FOURTEENTH: Prior to and at all times mentioned, plaintiff Huberta McCarthy was and still is the wife of plaintiff James L. McCarthy.

FIFTEENTH: By reason of the aforesaid, plaintiff Huberta McCarthy has been deprived of the services, consortium, company, society and companionship of her husband, plaintiff James L. McCarthy, and has been and will be required to expend sums of money for his medical care and attention.

SIXTEENTH: By reason thereof, plaintiffs James L. McCarthy and Huberta McCarthy have been damaged in the sum of Two Hundred Thousand (\$200,000) Dollars.

A SECOND CLAIM AGAINST DEFENDANT EAST AFRICAN AIRWAYS CORPORATION ON BEHALF OF JAMES L. MCCARTHY AND HUBERTA MCCARTHY

SEVENTEENTH: Plaintiffs James L. McCarthy and Huberta McCarthy repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Tenth" and "Thirteenth" through "Fifteenth" with the same force and effect as though fully set forth herein at length.

EIGHTEENTH: Said accident and injuries were not caused or contributed to by the plaintiff.

NINETEENTH: By reason thereof, plaintiffs James L. McCarthy and Huberta McCarthy have been damaged in the sum of Seventy-Five Thousand (\$75,000) Dollars.

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A THIRD CLAIM AGAINST DEFENDANT EAST AFRICAN AIRWAYS CORPORATION ON BEHALF OF JAMES L. MCCARTHY AND HUBERTA MCCARTHY

TWENTIETH: Plaintiffs James L. McCarthy and Huberta McCarthy repeat, reiterate and reallege every allegation contained in paragraphs "First" through "Tenth" and "Thirteenth" through "Fifteenth" with the same force and effect as though fully set forth herein at length.

TWENTY-FIRST: Said personal injuries were not caused by any fault on the part of any of the plaintiffs but was caused by defendant East African's wilful misconduct or by its acts or omissions done with intent to cause damage or done recklessly with knowledge that damage would probably result or such default as is considered to be the equivalent of wilful misconduct, in the operation, control and maintenance of said aircraft, and in other respects.

TWENTY-SECOND: By reason thereof, plaintiffs James L. McCarthy and Huberta McCarthy have been damaged in the sum of Two Hundred Thousand (\$200,000) Dollars.

A FOURTH CLAIM AGAINST DEFENDANTS BRITISH AIRCRAFT, DUNLOP AND BOAC ON BEHALF OF JAMES L. MCCARTHY AND HUBERTA MCCARTHY BASED ON NEGLIGENCE

TWENTY-THIRD: Plaintiffs James L. McCarthy and Huberta McCarthy repeat, reiterate and reallege every allegation contained in paragraphs "First" through "Seventh," "Thirteenth" through "Fifteenth" and "Eighteenth" with the same force and effect as though fully set forth herein at length.

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TWENTY-FOURTH: Prior to April 18, 1972, defendants BAC-Ltd., BAC-Commercial Aircraft, BAC-Operating and BAC-USA designed, manufactured, assembled, sold and maintained a certain British Aircraft Corporation VC-10 Type 1154 jet aircraft, Registration No. 5X-UVA, which was operated from Nairobi, Kenya to London, England via Addis Ababa, Ethiopia and Rome, Italy, by defendant East African on the 18th day of April, 1972.

TWENTY-FIFTH: Prior to April 18, 1972, defendants Dunlop designed, manufactured, assembled, sold and maintained the brakes and braking system of said British Aircraft Corporation VC-10 Type 1154 jet aircraft, Registration No. 5X-UVA, which was operated from Nairobi, Kenya to London, England via Addis Ababa, Ethiopia and Rome, Italy, by defendant East African on the 18th day of April, 1972.

TWENTY-SIXTH: Prior to April 18, 1972, defendant BOAC, either under a contractual arrangement with defendant East African or otherwise, maintained and performed maintenance upon aircraft owned, leased, operated or controlled by East African Airways Corporation, including said British Aircraft Corporation VC-10 type 1154 jet aircraft, Registration No. 5X-UVA, which was operated from Nairobi, Kenya to London, England via Addis Ababa, Ethiopia and Rome, Italy, by defendant East African on the 18th day of April, 1972.

TWENTY-SEVENTH: Prior to April 18, 1972, defendant BOAC assembled, maintained and performed maintenance upon the brakes and braking system of said British Corporation VC-10 Type 1154 jet aircraft, Registration No. 5X-UVA, which was operated from Nairobi, Kenya to London, England via Addis Ababa, Ethiopia and Rome, Italy, by defendant East African on the 18th day of April, 1972.

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TWENTY-EIGHTH: Said aircraft was caused to crash by the negligence of defendants BAC-Ltd., BAC-Commercial Aircraft, BAC-Operating and BAC-USA in that they carelessly designed, manufactured, assembled, sold and maintained said aircraft, its component parts, including the brakes and braking system of said aircraft, rendered inadequate, improper and insufficient warnings and instructions to defendant East African, other users of said aircraft, and other firms, individuals or companies which performed maintenance upon said aircraft and its component parts, including the brakes and braking system of said aircraft; by the negligence of defendants Dunlop in that they carelessly designed, manufactured, assembled, sold and maintained the brakes and braking system of said aircraft, rendered inadequate, improper and insufficient warnings and instructions to defendants BAC and/or defendant East African, and other firms, individuals or companies which performed maintenance upon said aircraft and its component parts, including the brakes and braking system of said aircraft; by the negligence of defendant BOAC in that it carelessly and negligently assembled, maintained and performed maintenance upon said aircraft and its component parts, including the brakes and braking system of said aircraft, rendered inadequate, improper and insufficient warnings and instructions to defendant East African; and the defendants were otherwise negligent.

TWENTY-NINTH: By reason thereof, plaintiffs James L. McCarthy and Huberta McCarthy have been damaged in the sum of Two Hundred Thousand (\$200,000) Dollars.

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A FIFTH CLAIM AGAINST DEFENDANTS BRITISH AIRCRAFT AND DUNLOP ON BEHALF OF JAMES L. MCCARTHY AND HUBERTA MCCARTHY BASED ON BREACH OF WARRANTY

THIRTIETH: Plaintiffs James L. McCarthy and Huberta McCarthy repeat, reiterate and reallege and allegations contained in paragraphs "First" through "Seventh," "Thirteenth" through "Fifteenth," "Eighteenth," "Twenty-Fourth" and "Twenty-Fifth" with the same force and effect as though fully set forth herein at length.

THIRTY-FIRST: Defendants BAC-Ltd., BAC-Commercial Aircraft, BAC-Operating and BAC-USA expressly and/or impliedly warranted that the said aircraft and its component parts, including the brakes and braking system of said aircraft, were airworthy, of merchantable quality, and fit and safe for the purposes for which they were designed, manufactured, assembled, sold, intended, maintained and used.

THIRTY-SECOND: Defendants Dunlop expressly and/or impliedly warranted that the said brakes and braking system of said aircraft were airworthy, of merchantable quality, and fit and safe for the purposes for which they were designed, manufactured, assembled, sold, intended, maintained and used.

THIRTY-THIRD: Defendants BAC-Ltd., BAC-Commercial Aircraft, BAC-Operating and BAC-USA breached said warranties in that the aircraft and its component parts, including the brakes and braking system of said aircraft, were not airworthy, of merchantable quality or fit and safe for the purposes for which they were designed, manufactured, assembled, sold, intended, maintained and used.

THIRTY-FOURTH: Defendants Dunlop breached said warranties in that the brakes and braking system of said

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aircraft were not airworthy, of merchantable quality or fit and safe for the purposes for which they were designed, manufactured, assembled, sold, intended, maintained and used.

THIRTY-FIFTH: Said crash and resulting damages were caused by the joint and several breaches of said warranties by said defendants, through their officers, agents and employees.

THIRTY-SIXTH: By reason thereof, plaintiffs James L. McCarthy and Huberta McCarthy have been damaged in the sum of Two Hundred Thousand (\$200,000) Dollars.

A SIXTH CLAIM AGAINST DEFENDANTS BRITISH AIRCRAFT AND DUNLOP ON BEHALF OF JAMES L. MCCARTHY AND HUBERTA MCCARTHY BASED ON STRICT LIABILITY

THIRTY-SEVENTH: Plaintiffs James L. McCarthy and Huberta McCarthy repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Seventh," "Thirteenth" through "Fifteenth," "Eighteenth," "Twenty-Fourth" and "Twenty-Fifth" with the same force and effect as though fully set forth herein at length.

THIRTY-EIGHTH: Prior to April 18, 1972, defendants BAC-Ltd., BAC-Commercial Aircraft, BAC-Operating and BAC-USA designed, manufactured, assembled, sold and maintained said aircraft and its component parts, including the brakes and braking system of said aircraft, in a manner so as to render said aircraft and said component parts defective and unsafe for their intended use.

THIRTY-NINTH: Prior to April 18, 1972, defendants Dunlop designed, manufactured, assembled, sold and maintained the brakes and braking system of said air-

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craft, in a manner so as to render said aircraft and said component parts defective and unsafe for their intended use.

FORTIETH: On April 18, 1972, said aircraft and its component parts, including the brakes and braking system of said aircraft, were being operated for the use for which they were designed, manufactured, assembled, sold and maintained, and in a manner reasonably foreseeable by said defendants.

FORTY-FIRST: Defendants' designing, manufacture, assembling, sale and maintenance of said aircraft and its component parts, including the brakes and braking system of said aircraft, caused said defective and unsafe conditions and was a proximate cause of the crash and, as a result thereof, said defendants are strictly liable in tort to plaintiff.

FORTY-SECOND: By reason thereof, plaintiffs James L. McCarthy and Huberta McCarthy have been damaged in the sum of Two Hundred Thousand (\$200,000) Dollars.

A SEVENTH CLAIM AGAINST DEFENDANT EAST AFRICAN
ON BEHALF OF PETER F. FAY AND SHARON L. FAY

FORTY-THIRD: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Third," "Sixth" and "Eighth" through "Tenth" with the same force and effect as though fully set forth herein at length.

FORTY-FOURTH: Prior to April 18, 1972, plaintiffs Peter F. Fay and Sharon L. Fay requested and offered to purchase from defendant East African's agent, one E. A. Sun, Sea & Safari, two tickets providing for air passage from Nairobi, Kenya to London, England, to New York, New York, but were instead sold two tickets providing for air passage from Nairobi, Kenya to London,

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England and instructed upon arrival in London to purchase from said agent two additional tickets providing for air passage from London to New York.

FORTY-FIFTH: On the 18th day of April, 1972, pursuant to said tickets, plaintiffs Peter F. Fay and Sharon L. Fay were passengers for hire aboard said aircraft.

FORTY-SIXTH: Said crash caused plaintiff Peter F. Fay personal injuries.

FORTY-SEVENTH: On the 18th day of April, 1972, defendant East African accepted plaintiff Peter F. Fay as a passenger for hire aboard said aircraft without delivering to him a ticket required by Article 3 of said Warsaw Convention.

FORTY-EIGHTH: By reason of the premises and Article 3, the defendant East African is not entitled to avail itself of those provisions of the Warsaw Convention which exclude or limit its liability.

FORTY-NINTH: By reason of the aforesaid, plaintiff Peter F. Fay has suffered and continues to suffer great physical and mental pain and anguish, was seriously and permanently injured, and has incurred and continues to incur medical and other expenses and was otherwise damaged.

FIFTIETH: Prior to and at all times mentioned, plaintiff Sharon L. Fay was and still is the wife of plaintiff Peter F. Fay.

FIFTY-FIRST: By reason of the aforesaid, plaintiff Sharon L. Fay has been deprived of the services, consortium, company, society and companionship of her husband, plaintiff Peter F. Fay, and has been and will be required to expend sums of money for his medical care and attention.

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FIFTY-SECOND: By reason thereof, plaintiffs Peter and Sharon Fay have been damaged in the sum of Three Hundred Fifty Thousand (\$350,000) Dollars.

AN EIGHTH CLAIM AGAINST DEFENDANT EAST AFRICAN ON BEHALF OF PETER F. FAY AND SHARON L. FAY

FIFTY-THIRD: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Third," "Sixth," "Eighth" through "Tenth," "Forty-Fourth" through "Forty-Sixth" and "Forty-Ninth" through "Fifty-First" with the same force and effect as though fully set forth herein at length.

FIFTY-FOURTH: Said accident and injuries were not caused or contributed to by the plaintiff Peter F. Fay.

FIFTY-FIFTH: By reason thereof, plaintiffs Peter and Sharon Fay have been damaged in the sum of Seventy-Five Thousand (\$75,000) Dollars.

A NINTH CLAIM AGAINST DEFENDANT EAST AFRICAN ON BEHALF OF PETER F. FAY AND SHARON L. FAY

FIFTY-SIXTH: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Third," "Sixth," "Eighth" through "Tenth," "Twenty-First," "Forty-Fourth" through "Forty-Sixth" and "Forty-Ninth" through "Fifty-First" with the same force and effect as though fully set forth herein at length.

FIFTY-SEVENTH: By reason thereof, plaintiffs Peter and Sharon Fay have been damaged in the sum of Three Hundred Fifty Thousand (\$350,000) Dollars.

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A TENTH CLAIM AGAINST DEFENDANTS BRITISH AIRCRAFT, DUNLOP AND BOAC ON BEHALF OF PETER F. FAY AND SHARON L. FAY BASED ON NEGLIGENCE

FIFTY-EIGHTH: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Third," "Sixth," "Twenty-Fourth" through "Twenty-Eighth," "Forty-Fourth" through "Forty-Sixth," "Forty-Ninth" through "Fifty-First" and "Fifty-Fourth" with the same force and effect as though fully set forth herein at length.

FIFTY-NINTH: By reason thereof, plaintiffs Peter and Sharon Fay have been damaged in the sum of Three Hundred Fifty Thousand (\$350,000) Dollars.

AN ELEVENTH CLAIM AGAINST DEFENDANTS BRITISH AIRCRAFT AND DUNLOP ON BEHALF OF PETER F. FAY AND SHARON L. FAY BASED ON BREACH OF WARRANTY

SIXTIETH: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Third," "Sixth," "Twenty-Fourth," "Twenty-Fifth," "Thirty-First" through "Thirty-Fifth," "Forty-Fourth" through "Forty-Sixth" and "Forty-Ninth" through "Fifty-First" and "Fifty-Fourth" with the same force and effect as though fully set forth herein at length.

SIXTY-FIRST: By reason thereof, plaintiffs Peter and Sharon Fay have been damaged in the sum of Three Hundred Fifty Thousand (\$350,000) Dollars.

A TWELFTH CLAIM AGAINST DEFENDANTS BRITISH AIRCRAFT AND DUNLOP ON BEHALF OF PETER F. FAY AND SHARON L. FAY BASED ON STRICT LIABILITY

SIXTY-SECOND: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First"

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through "Third," "Sixth," "Twenty-Fourth," "Twenty-Fifth," "Thirty-Eighth" through "Forty-First," "Forty-Fourth" through "Forty-Sixth" and "Forty-Ninth" through "Fifty-First" and "Fifty-Fourth" with the same force and effect as though fully set forth herein at length.

SIXTY-THIRD: By reason thereof, plaintiffs Peter and Sharon Fay have been damaged in the sum of Three Hundred Fifty Thousand (\$350,000) Dollars.

A THIRTEENTH CLAIM AGAINST DEFENDANT EAST AFRICAN ON BEHALF OF SHARON L. FAY AND PETER F. FAY

SIXTY-FOURTH: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Third," "Sixth," "Eighth" through "Tenth," "Forty-Fourth," and "Forty-Fifth" with the same force and effect as though fully set forth herein at length.

SIXTY-FIFTH: Said crash caused plaintiff Sharon L. Fay personal injuries.

SIXTY-SIXTH: On the 18th day of April, 1972, defendant East African accepted plaintiff Sharon L. Fay as a passenger for hire aboard said aircraft without delivering to her a ticket required by Article 3 of the said Warsaw Convention.

SIXTY-SEVENTH: By reason of the premises and Article 3, defendant East African is not entitled to avail itself of those provisions of the Warsaw Convention which exclude or limit its liability.

SIXTY-EIGHTH: By reason of the aforesaid, plaintiff Sharon L. Fay has suffered and continues to suffer great physical and mental pain and anguish, was seriously and permanently injured, and has incurred and continues to incur medical and other expenses and was otherwise damaged.

Amended Complaint

SIXTY-NINTH: Prior to and at all times mentioned, plaintiff Peter F. Fay was and still is the husband of plaintiff Sharon L. Fay.

SEVENTIETH: By reason of the aforesaid, plaintiff Peter F. Fay has been deprived of the services, consortium, company, society and companionship of his wife, plaintiff Sharon L. Fay, and has been and will be required to expend sums of money for her medical care and attention.

SEVENTY-FIRST: By reason thereof, plaintiffs Sharon and Peter Fay have been damaged in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars.

A FOURTEENTH CLAIM AGAINST DEFENDANT EAST AFRICAN ON BEHALF OF SHARON L. FAY AND PETER F. FAY

SEVENTY-SECOND: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Third," "Sixth," "Eighth" through "Tenth," "Forty-Fourth," "Forty-Fifth," "Sixty-Fifth" and "Sixty-Eighth" through "Seventieth" with the same force and effect as though fully set forth herein at length.

SEVENTY-THIRD: Said accident and injuries were not caused or contributed to by the plaintiff Sharon L. Fay.

SEVENTY-FOURTH: By reason thereof, plaintiffs Sharon and Peter Fay have been damaged in the sum of Seventy-Five Thousand (\$75,000) Dollars.

A FIFTEENTH CLAIM AGAINST DEFENDANT EAST AFRICAN ON BEHALF OF SHARON L. FAY AND PETER F. FAY

SEVENTY-FIFTH: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Third," "Sixth," "Eighth" through "Tenth," "Twenty-First," "Forty-Fourth," "Forty-Fifth," "Sixty-

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Fifth" and "Sixty-Eighth" through "Seventieth" with the same force and effect as though fully set forth herein at length.

SEVENTY-SIXTH: By reason thereof, plaintiffs Sharon and Peter Fay have been damaged in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars.

A SIXTEENTH CLAIM AGAINST DEFENDANTS BRITISH AIRCRAFT, DUNLOP AND BOAC ON BEHALF OF SHARON L. FAY AND PETER F. FAY BASED ON NEGLIGENCE

SEVENTY-SEVENTH: Plaintiffs repeat, reiterate and reallege the allegation contained in paragraphs "First" through "Third," "Sixth," "Twenty-Fourth" through "Twenty-Eighth," "Forty-Fourth," "Forty-Fifth," "Sixty-Fifth," "Sixty-Eighth" through "Seventieth" and "Seventy-Third" with the same force and effect as though fully set forth herein at length.

SEVENTY-EIGHTH: By reason thereof, plaintiffs Sharon and Peter Fay have been damaged in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars.

A SEVENTEENTH CLAIM AGAINST DEFENDANTS BRITISH AIRCRAFT AND DUNLOP ON BEHALF OF SHARON L. FAY AND PETER F. FAY BASED ON BREACH OF WARRANTY

SEVENTY-NINTH: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Third," "Sixth," "Twenty-Fourth," "Twenty-Fifth," "Thirty-First" through "Thirty-Fifth," "Forty-Fourth," "Forty-Fifth," "Sixty-Fifth" and "Sixty-Eighth" through "Seventieth" and "Seventy-Third" with the same force and effect as though fully set forth herein at length.

EIGHTIETH: By reason thereof, plaintiffs Sharon and Peter Fay have been damaged in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars.

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AN EIGHTEENTH CLAIM AGAINST DEFENDANTS BRITISH AIRCRAFT AND DUNLOP ON BEHALF OF SHARON L. FAY AND PETER F. FAY BASED ON STRICT LIABILITY

EIGHTY-FIRST: Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "First" through "Third," "Sixth," "Twenty-Fourth," "Twenty-Fifth," "Thirty-Eighth" through "Forty-First," "Forty-Fourth," "Forty-Fifth," "Sixty-Fifth" and "Sixty-Eighth" through "Seventieth" and "Seventy-Third" with the same force and effect as though fully set forth herein at length.

EIGHTY-SECOND: By reason thereof, plaintiffs Sharon and Peter Fay have been damaged in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars.

WHEREFORE, plaintiffs James L. McCarthy and Huberta McCarthy demand judgment against the defendant East African Airways Corporation on the First Claim in the sum of Two Hundred Thousand (\$200,000) Dollars, on the Second Claim in the sum of Seventy-Five Thousand (\$75,000) Dollars, and on the Third Claim in the sum of Two Hundred Thousand (\$200,000) Dollars; plaintiffs James L. McCarthy and Huberta McCarthy demand judgment against the defendants British Aircraft Corporation Ltd., British Aircraft Corporation (Commercial Aircraft) Ltd., British Aircraft Corporation (Operating) Ltd., British Aircraft Corporation (U. S. A.) Inc., Dunlop Limited, Dunlop Holdings, Ltd., Dunlop Co. of Great Britain and British Overseas Airways Corporation on the Fourth Claim in the sum of Two Hundred Thousand (\$200,000) Dollars; plaintiffs James L. McCarthy and Huberta McCarthy demand judgment against the defendants British Aircraft Corporation Ltd., British Aircraft Corporation (Commercial Aircraft) Ltd., British Aircraft Corporation (Operating) Ltd., British Aircraft Corporation (U.S.A.) Inc., Dunlop Limited, Dunlop Holdings, Ltd. and Dunlop Co. of Great Britain on the Fifth Claim in

Amended Complaint

the sum of Two Hundred Thousand (\$200,000) Dollars, and on the Sixth Claim in the sum of Two Hundred Thousand (\$200,000) Dollars; plaintiffs Peter F. Fay and Sharon L. Fay demand judgment against the defendant East African Airways Corporation on the Seventh Claim in the sum of Three Hundred Fifty Thousand (\$350,000) Dollars, on the Eighth Claim in the sum of Seventy-Five Thousand (\$75,000) Dollars, and on the Ninth Claim in the sum of Three Hundred Fifty Thousand (\$350,000) Dollars; plaintiffs Peter F. Fay and Sharon L. Fay demand judgment against the defendants British Aircraft Corporation Ltd., British Aircraft Corporation (Commercial Aircraft) Ltd., British Aircraft Corporation (Operating) Ltd., British Aircraft Corporation (U. S. A.) Inc., Dunlop Limited, Dunlop Holdings, Ltd., Dunlop Co. of Great Britain and British Overseas Airways Corporation on the Tenth Claim in the sum of Three Hundred Fifty Thousand (\$350,000) Dollars; plaintiffs Peter F. Fay and Sharon L. Fay demand judgment against the defendants British Aircraft Corporation Ltd., British Aircraft Corporation (Commercial Aircraft) Ltd., British Aircraft Corporation (Operating) Ltd., British Aircraft Corporation (U. S. A.) Inc., Dunlop Limited, Dunlop Holdings, Ltd. and Dunlop Co. of Great Britain on the Eleventh Claim in the sum of Three Hundred Fifty Thousand (\$350,000) Dollars and on the Twelfth Claim in the sum of Three Hundred Fifty Thousand (\$350,000) Dollars; plaintiffs Sharon L. Fay and Peter F. Fay demand judgment against the defendant East African Airways Corporation on the Thirteenth Claim in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars, on the Fourteenth Claim in the sum of Seventy-Five Thousand (\$75,000) and on the Fifteenth Claim in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars; plaintiffs Sharon L. Fay and Peter F. Fay demand judgment against the defendants British Aircraft Corporation Ltd., British Aircraft Corporation (Commercial Aircraft) Ltd., British

Amended Complaint

Aircraft Corporation (Operating) Ltd., British Aircraft Corporation (U. S. A.) Inc., Dunlop Limited, Dunlop Holdings, Ltd., Dunlop Co. of Great Britain and British Overseas Airways Corporation on the Sixteenth Claim in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars; and plaintiffs Sharon L. Fay and Peter F. Fay demand judgment against the defendants British Aircraft Corporation Ltd., British Aircraft Corporation (Commercial Aircraft) Ltd., British Aircraft Corporation (Operating) Ltd., British Aircraft Corporation (U. S. A.) Inc., Dunlop Limited, Dunlop Holdings, Ltd., and Dunlop Co. of Great Britain on the Seventeenth Claim in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars, and on the Eighteenth Claim in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars; together with the costs and disbursements of this action.

KREINDLER & KREINDLER

Attorneys for Plaintiffs

By: STANLEY J. LEVY

A Member of the Firm

Office and Post Office Address

99 Park Avenue

New York, New York 10016

**East African Airways Corp.'s Answer to Amended
Complaint.**

Defendant East African Airways Corporation (hereinafter East African) by its attorneys Condon & Forsyth, for its Answer to the Amended Complaint:

AS TO THE FIRST ALLEGED CLAIM

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph First of the Amended Complaint except that defendant East African admits that it is a body corporate established under the laws of Tanzania, Uganda and Kenya and that it maintains an office in New York, N. Y., U. S. A.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Second of the Amended Complaint *except* that defendant East African admits that aircraft bearing registration 5X-UVA on April 16, 1972 was leased to defendant East African by British Aircraft Corporation.

3. Denies the allegations in paragraph Third of the Amended Complaint *except* that defendant East African admits that it is a common carrier engaged in the business of transportation by air of persons, property and mail and in connection therewith on April 18, 1972 maintained and operated a certain Vickers Super VC-10 type 1154 aircraft, bearing registration 5X-UVA, which aircraft was then operating flight EC-720 from Nairobi, Kenya to London, England via Addis Ababa, Ethiopia and Rome, Italy.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Fourth of the Amended Complaint.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Fifth of the Amended Complaint *except* that defendant

*East African Airways Corp.'s Answer to Amended
Complaint*

East African admits that on April 18, 1972 one Mr. Jim McCarthy was a passenger on the aircraft referred to in paragraph 3 of this Answer.

6. Denies the allegations in paragraphs Sixth of the Amended Complaint *except* that defendant East African admits that on April 18, 1972 the aircraft referred to in paragraph 3 of this Answer sustained an accident at Haile Selassie International Airport, Addis Ababa, Ethiopia.

7. Denies the allegations in paragraph Seventh of the Amended Complaint.

8. Denies the allegations in paragraph Eighth of the Amended Complaint *except* that defendant East African admits that the United States of America, Kenya, Tanzania and Uganda were at all relevant times and are parties to the Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol, concluded on October 12, 1929, commonly referred to as the Warsaw Convention.

9. Denies the allegation in paragraph Ninth of the Amended Complaint *except* that defendant East African admits that prior to April 18, 1972 it had filed a counterpart to CAB Agreement No. 18900 with the Civil Aeronautics Board of the United States which was still in effect on April 18, 1972.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Tenth of the Amended Complaint.

11. Denies the allegations in paragraph Eleventh of the Amended Complaint.

12. Denies the allegations in paragraph Twelfth of the Amended Complaint.

*East African Airways Corp.'s Answer to Amended
Complaint*

13. Denies the allegations in paragraph Thirteenth of the Amended Complaint.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Fourteenth of the Amended Complaint.

15. Denies the allegations in paragraph Fifteenth of the Amended Complaint.

16. Denies the allegations in paragraph Sixteenth of the Amended Complaint.

AS TO THE SECOND ALLEGED CLAIM

17. Answering paragraph Seventeenth of the Amended Complaint, defendant East African repeats, reiterates and realleges each and every admission, allegation and denial in paragraphs 1 through 10 inclusive and 13 through 15 inclusive of this Answer with the same force and effect as if herein set forth in full.

18. Denies the allegations in paragraph Eighteenth of the Amended Complaint.

19. Denies the allegations in paragraph Nineteenth of the Amended Complaint.

AS TO THE THIRD ALLEGED CLAIM

20. Answering paragraph Twentieth of the Amended Complaint, defendant East African repeats, reiterates and realleges each and every admission, allegation and denial in paragraphs 1 through 10 inclusive and 13 through 15 inclusive of this Answer with the same force and effect as if herein set forth in full.

21. Denies the allegation in paragraph Twenty-First of the Amended Complaint.

*East African Airways Corp.'s Answer to Amended
Complaint*

22. Denies the allegations in paragraph Twenty-Second of the Amended Complaint.

AS TO THE SEVENTH ALLEGED CLAIM

23. Answering paragraph Forty-Third of the Amended Complaint defendant East African repeats, reiterates and realleges each and every admission, allegation and denial in paragraphs 1 through 3 inclusive, 6 and 8 through 10 inclusive of this Answer with the same force and effect as if herein set forth in full.

24. Denies the allegations in paragraph Forty-Fourth of the Amended Complaint.

25. Denies the allegations in paragraph Forty-Fifth of the Amended Complaint.

26. Denies the allegations in paragraph Forty-Sixth of the Amended Complaint.

27. Denies the allegations in paragraph Forty-Seventh of the Amended Complaint.

28. Denies the allegations in paragraph Forty-Eighth of the Amended Complaint.

29. Denies the allegations in paragraph Forty-Ninth of the Amended Complaint.

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Fiftieth of the Amended Complaint.

31. Denies the allegations in paragraph Fifty-First of the Amended Complaint.

32. Denies the allegations in paragraph Fifty-Second of the Amended Complaint.

*East African Airways Corp.'s Answer to Amended
Complaint*

AS TO THE EIGHTH ALLEGED CLAIM

33. Answering paragraph Fifty-Third of the Amended Complaint, defendant East African repeats, reiterates and realleges each and every admission, allegation and denial in paragraphs 1 through 3 inclusive, 6, 8 through 10 inclusive, 24 through 26 inclusive and 29 through 31 inclusive of this Answer with the same force and effect as if herein set forth in full.

34. Denies the allegations in paragraph Fifty-Fourth of the Amended Complaint.

35. Denies the allegations in paragraph Fifty-Fifth of the Amended Complaint.

AS TO THE NINTH ALLEGED CLAIM

36. Answering paragraph Fifty-Sixth of the Amended Complaint, defendant East African repeats, reiterates and realleges each and every admission, allegation and denial in paragraphs 1 through 3 inclusive, 6, 8 through 10 inclusive, 21, 24 through 26 inclusive and 29 through 31 inclusive of this Answer with the same force and effect as if herein set forth in full.

37. Denies the allegations in paragraph Fifty-Seventh of the Amended Complaint.

AS TO THE THIRTEENTH ALLEGED CLAIM

38. Answering paragraph Sixty-Fourth of the Amended Complaint, defendant East African repeats, reiterates and realleges each and every admission, allegation and denial in paragraphs 1 through 3 inclusive, 6, 8 through 10 inclusive, 24 and 25 of this Answer with the same force and effect as if herein set forth in full.

*East African Airways Corp.'s Answer to Amended
Complaint*

39. Denies the allegations in paragraphs Sixty-Fifth of the Amended Complaint.

40. Denies the allegations in paragraph Sixty-Sixth of the Amended Complaint.

41. Denies the allegations in paragraph Sixty-Seventh of the Amended Complaint.

42. Denies the allegations in paragraph Sixty-Eighth of the Amended Complaint.

43. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Sixty-Ninth of the Amended Complaint.

44. Denies the allegations in paragraph Seventieth of the Amended Complaint.

45. Denies the allegations in paragraph Seventy-First of the Amended Complaint.

AS TO THE FOURTEENTH ALLEGED CLAIM

46. Answering paragraph Seventy-Second of the Amended Complaint, defendant East African repeats, reiterates and realleges each and every admission, allegation and denial in paragraphs 1 through 3 inclusive, 6, 8 through 10 inclusive, 24, 25, 39 and 42 through 44 inclusive of this Answer with the same force and effect as if herein set forth in full.

47. Denies the allegations in paragraph Seventy-Third of the Amended Complaint.

48. Denies the allegations in paragraph Seventy-Fourth of the Amended Complaint.

*East African Airways Corp.'s Answer to Amended
Complaint*

AS TO THE FIFTEENTH ALLEGED CLAIM

49. Answering paragraph Seventy-Fifth of the Amended Complaint, defendant East African repeats, reiterates and realleges each and every admission, allegation and denial in paragraphs 1 through 3 inclusive, 6, 8 through 10 inclusive, 21, 24, 25, 39 and 42 through 44 inclusive of this Answer with the same force and effect as if herein set forth in full.

50. Denies the allegations in paragraph Seventy-Sixth of the Amended Complaint.

AFFIRMATIVE DEFENSE TO THE FIRST, SECOND AND THIRD ALLEGED CLAIMS

51. The liability of defendant East African, if any, is limited, in accordance with the provisions of the Warsaw Convention and defendant East African's counterpart to CAB Agreement No. 18900, to an aggregate sum not in excess of Seventy-Five Thousand Dollars (\$75,000.00).

FIRST AFFIRMATIVE DEFENSE TO THE SEVENTH, EIGHTH, NINTH, THIRTEENTH, FOURTEENTH AND FIFTEENTH ALLEGED CLAIMS

52. The Court lacks jurisdiction over the subject matter of this Action in that the United States of America is not one of the places specified in Article 28 of the Warsaw Convention where this Action must be brought.

*East African Airways Corp.'s Answer to Amended
Complaint*

SECOND AFFIRMATIVE DEFENSE TO THE SEVENTH, EIGHTH,
NINTH, THIRTEENTH, FOURTEENTH AND FIFTEENTH ALLEGED
CLAIMS

53. The liability of defendant East African, if any, is limited with respect to each passenger, in accordance with the provisions of the Warsaw Convention, to an aggregate sum not in excess of Ten Thousand Dollars (\$10,000.00).

THIRD AFFIRMATIVE DEFENSE TO THE SEVENTH, EIGHTH,
NINTH, THIRTEENTH, FOURTEENTH AND FIFTEENTH ALLEGED
CLAIMS

54. Defendant East African took all necessary measures to avoid the damages alleged in the Amended Complaint and, in accordance with Article 20(1) of the Warsaw Convention, defendant East African is not liable to these plaintiffs.

FOURTH AFFIRMATIVE DEFENSE TO THE SEVENTH, EIGHTH,
NINTH, THIRTEENTH, FOURTEENTH AND FIFTEENTH ALLEGED
CLAIMS

55. It was impossible for defendant East African to take all necessary measures to avoid the damages alleged in the Amended Complaint and, in accordance with Article 20(1) of the Warsaw Convention, defendant East African is not liable to these plaintiffs.

WHEREFORE, defendant East African demands judgment dismissing the Amended Complaint as to all plaintiffs, with costs and disbursements, or if such relief not be

*East African Airways Corp.'s Answer to Amended
Complaint*

granted, then that defendant East African's liability be limited as prayed herein.

Dated: New York, New York
June 29th, 1973

CONDON & FORSYTH
By George N. Tompkins, Jr.
A Member of the Firm
Attorneys for Defendant East African
Airways Corporation
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 757-6870

To:

Kreindler & Kreindler
Attorneys for Plaintiffs
99 Park Avenue
New York, New York 10016
Tel.: (212) 687-8181

Bigham, Englar, Jones & Houston
Attorneys for Defendants
British Aircraft Corporation, Ltd.
99 John Street
New York, New York 10038
Tel.: (212) RE 2-4646

East African Airways Corp.'s Request for Admissions.

Defendant East African Airways Corporation requests plaintiff Sharon L. Fay, within ten (10) days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the document annexed hereto and marked Exhibit "A" is a true copy of plaintiff's passenger ticket and is genuine.

2. That the said ticket provided for defendant to transport plaintiff from Nairobi, Kenya to London, England on April 18, 1972.

3. That plaintiff Sharon L. Fay used this ticket to travel on Flight No. EC720 operated by defendant East African Airways Corporation on April 18, 1972.

4. That the alleged injuries complained of by plaintiff Sharon L. Fay were sustained during the course of plaintiff's transportation pursuant to the passenger ticket annexed hereto as Exhibit "A".

5. The passenger ticket annexed hereto as Exhibit "A" was purchased by plaintiff Sharon L. Fay in Nairobi, Kenya.

6. The origin specified in the ticket was Nairobi, Kenya.

East African Airways Corp.'s Request for Admissions

7. The destination specified in the ticket was London, England.

Dated: New York, New York
January 15, 1974

CONDON & FORSYTH

By GEORGE N. TOMPKINS, Jr.

A Member of the Firm

Attorneys for Defendant

East African Airways

Corporation

1251 Avenue of the Americas

New York, New York 10020

Tel: (212) 757-6870

To:

Kreindler & Kreindler

Attorneys for Plaintiffs

99 Park Avenue

New York, New York 10016

Tel: (212) MU 7-8181

ISSUED BY EAST AFRICAN AIRWAYS		PASSENGER TICKET AND BAGGAGE CHECK		FLIGHT COUPON NO. 10941 3.559.929	
RESTRICTIONS/ENDORSEMENTS NOT REFUNDABLE VALID FOR EC ONLY NON ENDORSEABLE		DATE OF ISSUE OF THIS TICKET EAA 41-4-9009 13 APR 1972 NAIROBI			
NOT TRANSFERABLE NOT VALID EXCEPT FOR EC ONLY		RESERVATIONS			
FROM NAIROBI		TO EC 720		DATE 13 APR	
CLASS Y		FARE BASIS Y		WEIGHT PLD	
TICKET DESIGNATION/TOUR CODE		ORIGIN		DESTINATION	
FARE 3000		ISSUED IN CONJUNCTION WITH		ISSUED IN EXCHANGE FOR	
TAX 300		FORM & SERIAL NO.		PLACE	
FORM OF PAYMENT		ORIGINAL ISSUE		AGENT'S SIGNATURE CODE	

EXHIBIT A, ANNEXED TO EAST AFRICAN AIRWAYS CORP.'S REQUEST FOR ADMISSIONS--PLAINTIFF'S PASSENGER TICKET.

Plaintiffs Fay's Responses to Request for Admissions.

Plaintiffs Peter F. Fay and Sharon L. Fay, by their attorneys, Kreindler & Kreindler, respectfully respond to defendant East African Airways Corporation's Requests for Admissions dated January 15, 1974:

1. Deny because the documents marked Exhibit "A" are a true copy of only part of the passenger tickets of plaintiffs Peter and Sharon Fay.

2 & 7. Deny because each Request for Admission refers to the ticket in Request 1. In addition, and more specifically relating to each Request:

2. Deny, except admit that said plaintiffs were en route from Nairobi, Kenya to New York, New York and were, pursuant to tickets, provided transportation by said defendant from Nairobi, Kenya to London, England on April 18, 1972.

3. Deny except admit that said plaintiffs used their tickets to travel on Flight Number EC720 operated by defendant East African Airways Corporation on April 18, 1972.

4. Deny, except admit that the injuries complained of by said plaintiffs were sustained during the course of plaintiffs' transportation pursuant to their passenger tickets.

5. Deny, except admit that said plaintiffs purchased their passenger tickets in Nairobi, Kenya.

6. Deny, except admit that the origin specified in the parts of the tickets marked as Exhibit "A" was Nairobi, Kenya.

Plaintiffs Fay's Responses to Request for Admissions

7. Deny, except admit that the destination specified in the parts of the tickets marked as Exhibit "A" was London, England.

Dated: New York, New York
January 24, 1974

KREINDLER & KREINDLER
Attorneys for Plaintiffs Fay
By MILTON G. SINCOFF
A Member of the
Firm
99 Park Avenue
New York, New York 10016
(212) 687-8181

To:

Condon & Forsyth, Esqs.
Attorneys for defendant
East African Airways Corporation
and all other defendants
except BAC
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Bigham, Englar, Jones & Houston, Esqs.
Attorneys for Defendant BAC
99 John Street
New York, New York 10038
(212) RE-2-4646

East African Airways Corp.'s Motion to Dismiss.

SIRS:

Defendant East African Airways Corporation, by its attorneys Condon & Forsyth, moves the Court, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3), for an Order dismissing the Amended Complaint as to East African Airways Corporation upon the basis of the First Affirmative Defense to the Seventh, Eighth, Ninth, Thirteenth, Fourteenth and Fifteenth Alleged Claims, set forth in its Answer on the ground that the Court lacks subject matter jurisdiction over the Amended Complaint as to East African Airways Corporation, the moving defendant, by virtue of the provisions of Article 28 of a treaty of the United States known as the Warsaw Convention.

Please Take Notice, that the undersigned will bring this Motion on for hearing before this Court at Room 519, United States Courthouse, Foley Square, New York, New York, on the 15th day of February, 1974 at 2:15 o'clock in the afternoon of the day or as soon thereafter as counsel can be heard.

Please Take Further Notice, that this Motion is based upon the following papers, copies of which are annexed hereto:

Amended Complaint

Answer to the Amended Complaint

Annexed Affidavits of George N. Tompkins, Jr., sworn to February , 1974, Edward S. Mukasa, sworn to January 22, 1974 and Martin Weche, sworn to January 22, 1974 and Exhibits attached thereto.

East African Airways Corp.'s Motion to Dismiss

Defendant's supporting Memorandum of Points and Authorities is served and filed simultaneously herewith.

Dated: New York, New York
February 4, 1974

CONDON & FORSYTH
By GEORGE N. TOMPKINS, Jr.
A Member of the Firm
Attorneys for Defendant
East African Airways
Corporation
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 757-6870

To:

Kreindler & Kreindler
Attorneys for Plaintiffs
99 Park Avenue
New York, New York 10016
Tel: (212) 687-8181

Bigham, Englar, Jones & Houston
Attorneys for Defendants
British Aircraft Corporation, Ltd.,
British Aircraft Corporation
(Commercial Aircraft), Ltd.,
British Aircraft Corporation
(Operating), Ltd.,
British Aircraft Corporation
(U.S.A.), Inc.,
99 John Street
New York, New York 10038

**Affidavit of George N. Tompkins, Jr., in Support of
Motion to Dismiss.**

State of New York,
County of New York, ss:

GEORGE N. TOMPKINS, Jr., being first duly sworn, deposes and says:

1. I am an attorney and counsellor at law and a member of the firm of Condon & Forsyth, attorneys for defendant East African Airways Corporation (hereinafter EAAC) and am fully familiar with all of the pleadings and proceedings heretofore had herein.

2. I submit this affidavit and the attached Memorandum of Points and Authorities in support of the within motion of defendant EAAC to dismiss the Amended Complaint (Attached hereto as Exhibit "A") as to EAAC, and more particularly the Seventh, Eighth, Ninth, Thirteenth, Fourteenth and Fifteenth claims in the Amended Complaint of plaintiffs Peter F. Fay and Sharon L. Fay against EAAC, in that the Amended Complaint is exclusively governed by a Treaty of the United States, the Warsaw Convention, and by virtue of the provisions of Article 28 of said Convention this Court lacks subject matter jurisdiction over the Amended Complaint. Answer of EAAC to Amended Complaint, Attached hereto as Exhibit "B", paragraph 52.

3. In factual support of this motion, submitted herewith is the affidavit of Edward S. Mukasa, sworn to January 22, 1974, attached hereto as Exhibit "C" (hereinafter Mukasa Affidavit, Exhibit C, para.), and the affidavit of Martin Weche, sworn to January 22, 1974, attached hereto as Exhibit "D" (hereinafter Weche Affidavit, Exhibit D, para.).

4. On April 18, 1972, plaintiffs Peter F. Fay and Sharon L. Fay were travelling on an aircraft operated by EAAC from Nairobi, Kenya, to London, England

*Affidavit of George N. Tompkins, Jr., in Support of
Motion to Dismiss*

which on take-off from Haile Selassie I International Airport, Addis Ababa, Ethiopia. Amended Complaint, Exhibit A, paras. Third, Sixth and Forty-Fifth.

5. Plaintiffs allege that they attempted to purchase tickets for transportation between Nairobi, Kenya and New York, New York from E. A. Sun, Sea & Safari, allegedly an agent of EAAC, but instead were issued tickets from Nairobi to London. Amended Complaint, Exhibit A, para. Forty-Fourth. However, the Affidavit of Edward S. Mukasa shows not only that they could not make such a purchase from E. A. Sur., Sea & Safari and that it was not an agent of EAAC (Mukasa Affidavit, Exhibit C, paras. 3-7), but that the tickets pursuant to which they were travelling were purchased from an EAAC ticket office. Mukasa Affidavit, Exhibit C, para. 8; Weche Affidavit, Exhibit D, para. 4.

6. The passenger tickets of the Fays provided for "international transportation" within the meaning of Article 1(2) of the Warsaw Convention since the place of origin was Nairobi, Kenya and the place of destination was London, England. Weche Affidavit, Exhibit D, para. 5. Accordingly, all the claims of the Fay plaintiffs against EAAC are exclusively governed by the rules of the Warsaw Convention.

7. Subject matter jurisdiction exists only in the four places enumerated in Article 28 of the Convention, and any action must be brought in:

- (a) The domicile of the carrier;
- (b) The principal place of business of the carrier;
- (c) Where the ticket was purchased;
- (d) The place of destination.

*Affidavit of George N. Tompkins, Jr., in Support of
Motion to Dismiss*

8. None of the four places enumerated above is in the United States. The domicile of EAAC is in the East African Community consisting of the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya. Mukasa Affidavit, Exhibit C, para. 2. The principal place of business of EAAC is in Nairobi, Kenya. Mukasa Affidavit, Exhibit C, para. 5; Weche Affidavit, Exhibit D, para. 4. The place of destination of the Fay plaintiffs according to their passenger tickets was London, England. Weche Affidavit, Exhibit D, para. 5. Since none of those places is in the United States, this Court lacks subject matter jurisdiction over the Amended Complaint of the Fays as to this defendant.

WHEREFORE, it is respectfully submitted that this Court should grant the within motion of defendant East African Airways Corporation in all respects, with costs and disbursements.

Dated: New York, New York
February 4, 1974

(Sworn to by George N. Tompkins, Jr., February 4, 1974.)

**Exhibit C, Attached to Affidavit of George N. Tompkins,
Jr.—Affidavit of Edward S. Mukasa.**

Republic of Kenya,
Nairobi City,
Embassy of the United
States of America, ss:

Kenya, City of,
Nairobi Embassy
of the United
States of America, ss:

EDWARD S. MUKASA, being first duly sworn, deposes
and says:

1. I am employed by East African Airways in Nairobi City as Tariffs Manager and Manager IATA Affairs. I am also chairman of the IATA Agency Investigation Panel for East Africa. I am fully familiar with the corporate organization, business activities and operations of East African Airways. I am also fully familiar and have direct personal knowledge of all local agents of East African Airways and all IATA Agents in East Africa.

2. East African Airways Corporation is a corporation organized and existing under the East African Airways Corporation Act of 1967 of the Laws of the East African Community, consisting of the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya. The headquarters, principal offices and chief executive offices of East African Airways are located at Sadler House, Nairobi, Kenya. All of its aircraft are based in Kenya and the day to day operations of the company are controlled from Kenya. East African Airways does not conduct any flights into the United States.

3. E.A. Sun, Sea and Safari is not and, was not, in April of 1972, a local sales agent for East African Airways. A local sales agent is one authorized by a car-

Exhibit C, Annexed to Affidavit of George N. Tompkins, Jr.

rier to issue tickets for "domestic" transportation only, namely between points in Uganda, Tanzania and Kenya and between points within those nations.

4. E.A. Sun, Sea and Safari is not and was not at any time an IATA agent, namely an agent duly appointed by the International Air Transport Association to issue tickets for international transportation on carriers such as East African Airways, who are members of IATA. E.A. Sun, Sea and Safari could not issue a ticket for transportation between Nairobi and London or for transportation between Nairobi and New York with an intermediate stopping place in London.

5. I have read a copy of the Complaint filed in Civil Action No. 73 Civ. 1984 in the United States District Court for the Southern District of New York, which asserts in paragraph Forty-Fourth in part as follows:

"Prior to April 18, 1972, plaintiffs Peter F. Fay and Sharon L. Fay requested and offered to purchase from East African's agent, one E.A. Sun, Sea and Safari, two tickets providing for air passage from Nairobi, Kenya to London, England, to New York, New York, but were instead sold two tickets providing for air passage from Nairobi, Kenya to London, England and instructed upon arrival in London to purchase from said agent two additional tickets providing for air passage from London to New York."

6. E.A. Sun, Sea and Safari is not and never was a local agent, IATA agent or any other kind of agent for East African Airways, and could not at the present time or at any other time in the past, under any circumstances, issue a ticket for transportation between either Nairobi/London or Nairobi/London/New York.

*Exhibit C, Annexed to Affidavit of George N. Tompkins,
Jr.*

7. East African Airways has no ownership or other legal or equitable interest, or contractual relationship with E.A. Sun, Sea and Safari as its agent or representative. E.A. Sun, Sea and Safari purchases tickets for its clients in the same manner as any other person or organization purchases tickets from East African Airways or an IATA agent.

8. I have examined the flight coupons of tickets numbered 0941-3.559.928 and 0941-3.559.929, copies of which are attached hereto. In the upper right hand corner the stamp "EAA 41-4900913 APR 1972 Nairobi" indicates that these tickets were issued by an East African ticket office in Nairobi, Republic of Kenya, on April 13, 1972. They were not issued by an IATA agent of East African Airways, and as above indicated, were not and could not have been issued by E.A. Sun, Sea and Safari.

(Sworn to by Edward S. Mukasa, January 22, 1974.)

ISSUED BY EAST AFRICAN AIRWAYS SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 2		PASSENGER TICKET AND BAGGAGE CHECK		FLIGHT COUPON NO. 10941 3.559.928	
NAME OF PASSENGER MR. P. FAY NOT TRANSFERABLE		RESTRICTIONS/ENDORSEMENTS NOT REFUNDABLE VALID FOR EC ONLY NON ENDORSEABLE		DATE OF ISSUE OF THIS TICKET EAA 41-4 9009 13 APR 1972 NAIROBI	
NOT VALID BEFORE 12 NOT VALID AFTER 23		RESERVATIONS		BAGGAGE	
FROM NAIROBI	FARE BASIS Y	CARRIER EC	FLIGHT/CLASS 720	DATE 12 APR	TIME 1100
TO LONDON				STATUS OK	NO. OF 2
TICKET DESIGNATOR/TOUR CODE		ORIGIN		DESTINATION	
ISSUED IN CONJUNCTION WITH FORM		ISSUED IN EXCHANGE FOR FORM		SERIAL NO. (S)	
FORM OF PAYMENT		ORIGINAL ISSUE CARRIER		FORM & SERIAL NO.	
PLACE		DATE		AGENT'S NUMERIC CODE	

ISSUED BY EAST AFRICAN AIRWAYS SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 2		PASSENGER TICKET AND BAGGAGE CHECK		FLIGHT COUPON NO. 10941 3.559.928	
NAME OF PASSENGER MRS. S. L. FAY NOT TRANSFERABLE		RESTRICTIONS/ENDORSEMENTS NOT REFUNDABLE VALID FOR EC ONLY NON ENDORSEABLE		DATE OF ISSUE OF THIS TICKET EAA 41-4 9009 13 APR 1972 NAIROBI	
NOT VALID BEFORE 12 NOT VALID AFTER 23		RESERVATIONS		BAGGAGE	
FROM NAIROBI	FARE BASIS Y	CARRIER EC	FLIGHT/CLASS 720	DATE 12 APR	TIME 1100
TO LONDON				STATUS OK	NO. OF 2
TICKET DESIGNATOR/TOUR CODE		ORIGIN		DESTINATION	
ISSUED IN CONJUNCTION WITH FORM		ISSUED IN EXCHANGE FOR FORM		SERIAL NO. (S)	
FORM OF PAYMENT		ORIGINAL ISSUE CARRIER		FORM & SERIAL NO.	
PLACE		DATE		AGENT'S NUMERIC CODE	

EXHIBIT C, ATTACHED TO AFFIDAVIT OF GEORGE N. TOMPKINS, JR.

**Exhibit D, Attached to Affidavit of George N. Tompkins,
Jr.—Affidavit of Martin Weche.**

Republic of Kenya,
Nairobi City,
Embassy of the United
States of America, ss:

Kenya, City of,
Nairobi Embassy
of the United
States of America, ss:

MARTIN WECHE, being first duly sworn, deposes and says:

1. I am employed by East African Airways as Accountant, Passenger Revenue, and am fully familiar with the ticketing practices and procedures of East African Airways.

2. Attached hereto as Exhibit A are copies of the Flight Coupons from tickets numbered 0941-3.559.928 and 0941-3.559.929 issued to a "Mr. P. F. Fay" and "Mrs. S. L. Fay" respectively. This ticket provides for transportation on East African Airways (EC) Flight 720 on April 18 from Nairobi to London. It was not issued in conjunction with any other ticket as the portion of the ticket to be completed in the event of a conjunction ticket is blank. When Mr. and Mrs. Fay checked in for departure, these flight coupons were taken from their ticket booklet and they were issued Boarding Passes. These flight coupons were actually used for the transportation provided on the ticket and in due course were returned to my office.

3. When these tickets were sold, the Auditor's Coupon was taken from the ticket booklet and, as it was issued on East African Airways ticket stock, was returned

Exhibit D, Attached to Affidavit of George N. Tompkins, Jr.

to my office after sale. Copies of the Auditor's Coupons for East African Airways tickets numbered 0941-3.559.928 and 0941-3.559.929 are attached as Exhibit B.

4. The stamp in the upper right hand corner of the tickets namely "EAA 41-4 9009 13 April 1972 Nairobi" indicates that these tickets were purchased from an East African Airways ticket office in Nairobi on April 13, 1972.

5. As evidenced by Exhibits A & B, the Flight and Auditor's coupons 0941-3.559.928 and 0941-3.559.929, these tickets were issued to Mr. P. F. Fay and Mrs. S. L. Fay in Nairobi, Republic of Kenya. The place of origin according to the ticket was Nairobi and the place of destination according to the ticket was London.

(Sworn to by Martin Weche, January 22, 1974.)

Exhibit D, Attached to Affidavit of George N. Tompkins, Jr., Continued—Exhibit A, Attached to Affidavit of Martin Weche.

(Reproduced, *supra*, at p. , as Exhibit A, Attached to Affidavit of George N. Tompkins, Jr.)

ISSUED BY EAST AFRICAN AIRWAYS SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 2		PASSENGER TICKET AND BAGGAGE CHECK		AUDITOR'S COUPON 0941 3.559.928	
NAME OF PASSENGER MR. P.F. FAY NOT TRANSFERABLE		RESTRICTIONS/ENDORSEMENTS NOT REFUNDABLE VALID FOR EC ONLY NON ENDERSEABLE		DATE AND PLACE OF ISSUE EAA 41-4 9009 13 APR 1972 NAIROBI	
NOT VALID BEFORE 18 APR 72		RESERVATIONS		BAGGAGE	
NOT GOOD FOR PASSAGE	FARE BASIS	CARRIER	FLIGHT/CLASS	DATE	TIME
FROM NAIROBI	Y	EC	720	18	0900
TO LONDON				APR	020
TICKET DESIGNATOR/TOUR CODE		ORIGIN		DESTINATION	
Void					
ISSUED IN CONJUNCTION WITH FORM	SERIAL No. (S)	ISSUED IN EXCHANGE FOR CARRIER FORM		SERIAL No. (S)	
FORM & SERIAL No.		PLACE		DATE	
FORM OF PAYMENT		ORIGINAL ISSUE CARRIER		AGENT'S BUREAU CODE	

ISSUED BY EAST AFRICAN AIRWAYS SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 2		PASSENGER TICKET AND BAGGAGE CHECK		AUDITOR'S COUPON 0941 3.559.929	
NAME OF PASSENGER MRS. S.L. FAY NOT TRANSFERABLE		RESTRICTIONS/ENDORSEMENTS NOT REFUNDABLE VALID FOR EC ONLY NON ENDERSEABLE		DATE AND PLACE OF ISSUE EAA 41-4 9009 13 APR 1972 NAIROBI	
NOT VALID BEFORE 18 APR 72		RESERVATIONS		BAGGAGE	
NOT GOOD FOR PASSAGE	FARE BASIS	CARRIER	FLIGHT/CLASS	DATE	TIME
FROM NAIROBI	Y	EC	720	8	0900
TO LONDON				APR	020
TICKET DESIGNATOR/TOUR CODE		ORIGIN		DESTINATION	
Void					
ISSUED IN CONJUNCTION WITH FORM	SERIAL No. (S)	ISSUED IN EXCHANGE FOR CARRIER FORM		SERIAL No. (S)	
FORM & SERIAL No.		PLACE		DATE	
FORM OF PAYMENT		ORIGINAL ISSUE CARRIER		AGENT'S BUREAU CODE	

EXHIBIT D, ATTACHED TO AFFIDAVIT OF GEORGE N. TOMPKINS, JR.,
CONTINUED--EXHIBIT B, ATTACHED TO AFFIDAVIT OF MARTIN WECHE.

Affidavit of Milton G. Sincoff in Opposition to Motion.

State of New York,
County of New York, ss:

MILTON G. SINCOFF, being duly sworn, deposes and says:

1. I am an attorney and a member of the firm of Kreindler & Kreindler, attorneys for the plaintiffs herein and am fully familiar with the pleadings and proceedings heretofore had herein. I submit this affidavit in opposition to the defendant East African Airways' motion to dismiss certain claims alleged against it by the Fay plaintiffs.

2. Specifically the plaintiffs oppose the defendant's motion to dismiss on the grounds that:

- a) New York was "the place of destination" of the Fays and, therefore, the venue requirements of Article 28 are satisfied;
- b) Assuming *arguendo* that venue requirements are not met, the continued pendency of the identical and companion claims by the McCarthy plaintiffs warrant the exercise of this Court's discretionary pendant or ancillary jurisdiction of the Fays' claims;
- c) To construe the Warsaw Convention in a way so as to bar the Fays from the courts of the United States, their place of citizenship and residence, would deprive them of their rights under Article III of the Constitution.

3. All of the claims alleged by all of the plaintiffs in this action arise out of the identical operative facts, i. e., the subject accident. All of the plaintiffs allege the same claims against each of the individual corporate defendants. The claims of both the McCarthy and Fay plaintiffs against the defendant air carrier are identical in fact and theory. Moreover, it is your deponents opinion

Affidavit of Milton G. Sincoff in Opposition to Motion

that all of the claims against the defendant air carrier are meritorious. All reports and documents available at this time indicate that the immediate cause of the crash was the failure of the aircraft's anti-skid and braking systems, which were discovered subsequent to the accident to have been negligently and improperly installed and maintained.

4. The defendant East African Airways Corporation is a foreign commercial air carrier, organized and existing under the laws of the East African Community, having its principal place of business in Nairobi, Kenya. The defendant air carrier is doing business in the United States and the State of New York and has a business office located in New York City, New York at 557 Fifth Avenue. East African Airways did petition and was granted a permit by the Civil Aeronautics Board of the United States of America to act as an authorized foreign air carrier of persons and property with terminal points in New York, New York. Said permit, originally issued on December 3, 1970, and, thereafter, renewed at the request of the air carrier on May 4, 1973, is still in effect. (Exhibit "4" attached). There is diversity of citizenship jurisdiction between all the plaintiffs and all the defendants. Finally, because East African Airways Corporation is clearly doing business in New York, it is subject to *in personam* jurisdiction in this State.

5. As alleged in the Amended Complaint (paragraph Forty-Fourth) and supported by the Fays' affidavit and documentary evidence, the Fays purchased their ticket for passage on the subject aircraft from E.A. Sun, Sea, Safari in Nairobi. E.A., Sun, Sea, Safari was acting as ticket agent for the defendant air carrier and was fully aware that the plaintiffs' intended destination was New York, New York. [Exhibit "1", at paragraphs 5-7].

Affidavit of Milton G. Sincoff in Opposition to Motion

6. The Fay plaintiffs had absolutely no contact with the defendant air carrier prior to their boarding the subject aircraft. Contrary to the statements contained in Mr. Mukasa's affidavit, their tickets were issued to them by E. A. Sun, Sea, Safari in Nairobi. Payment for said tickets were made to E.A. Sun, Sea, Safari by Peter F. Fay. [Exhibit "2"]. In fact, a receipt for said payment was issued to Peter F. Fay by an employee of E. A. Sun, Sea, Safari. [Exhibit "3"]. East African Airways Corporation received the monetary benefit of the plaintiffs' transaction through E.A. Sun, Sea, Safari and said agency was authorized to so act.

7. The exhibits attached hereto showed that there was an agency relationship between the air carrier and the travel agency or, at the very least, the travel agency was authorized to act by East African Airways Corporation. Under these circumstances, it is respectfully submitted that the defendant's motion should be denied as a matter of law. Should the Court determine that there is a question of fact, then the jury should determine the issue at trial. In light of these facts and for all the reasons and authorities set forth in the plaintiffs' Memorandum of Law in Opposition, it is respectfully submitted that the defendant's motion to dismiss should be denied.

8. Should the Court have doubt as to its subject matter jurisdiction, then the Court should exercise jurisdiction over the subject claims against East African Airways by invoking its discretionary powers of pendent or ancillary jurisdiction. The circumstances in this case are particularly well suited for an application of the doctrine of pendent jurisdiction. With the single exception of the Fays' claim against the air carrier, this Court does have undisputed subject matter jurisdiction over all of the other claims asserted in the complaint. All of these claims without exception arise out

Affidavit of Milton G. Sincoff in Opposition to Motion

of the identical operative facts. Most significantly, this Court does have undisputed subject matter jurisdiction over the claims of the McCarthy plaintiffs which claims are identical to those referred to in the defendant's within motion. Notwithstanding the allegations in the defendant's motion to dismiss, this Court, because of the complete diversity of citizenship between the Fay plaintiffs and East African Airways, does have an independent jurisdictional basis over their claims against the air carrier.

9. Granting the defendant's motion herein will not promote substantial justice, convenience or fairness to the parties in this litigation. Nor will it foster the goals of judicial economy. Regardless of the outcome of the motion, the defendant air carrier will remain in this litigation because of its obligation to defend the identical issues of liability alleged by the McCarthy plaintiffs.

10. Granting the defendant's motion herein would only serve to severely prejudice the Fay plaintiffs by effectively denying them of all their rights against the air carrier. The Fays cannot possibly afford to retain a lawyer in London, England, or Nairobi, Kenya, to pursue their meritorious claims against the defendant East African Airways. Aside from the fact that contingency retainer agreements are not available in those forums, the additional travel expense that would necessarily be involved would be enormous. The Fays like the McCarthy plaintiffs are American citizens who were severely and permanently injured as a result of the air carrier's negligence. They are of modest means and could not possibly pursue their meritorious claims against the defendant Air carrier at a separate time in a different form. In addition, it should be noted that as a result of the subject accident these plaintiffs required substantial medical treatment which was obtained from doctors here in the United States.

Affidavit of Milton G. Sincoff in Opposition to Motion

11. Finally, as is more fully discussed and supported in plaintiffs' Memorandum of Law in Opposition (Point III, at 11), to construe the Warsaw Treaty in a way so as to bar the Fays from the courts of the United States, would deprive them of their rights under Article III under the United States Constitution. The Warsaw Treaty can be read consistently with the plaintiffs' constitutional rights of access to the federal courts of this country and under the circumstances of this case, such a reading is clearly warranted. The particular facts in this case do indicate that the plaintiffs' intended destination was the United States and, therefore, the plaintiffs have met the requirements of Article 28. If, however, the Court does not find that the plaintiffs have met the literal requirements of Article 28, then the Court should, in an effort to avoid a conflict between the Constitution and the Treaty, find that Article III of the Constitution supplements and adds to the number of places wherein the plaintiffs can pursue their meritorious claims against the defendant air carrier.

WHEREFORE, your deponent respectfully request the Court to deny the defendant's motion to dismiss in all respects and for such other and further relief as to this Court may seem appropriate under the unique circumstances of this case.

(Sworn to by Milton G. Sincoff, May 17, 1974.)

**Exhibit 1, Attached to Affidavit of Milton G. Sincoff—
Affidavit of Peter F. Fay and Sharon L. Fay.**

State of California,
County of Ventura, ss:

PETER F. FAY and SHARON L. FAY, being duly sworn,
depose and say:

1. We are citizens of the United States of America and plaintiffs in the within action and submit this joint affidavit in opposition to the motion by East African Airways Corporation to dismiss our complaint for lack of subject matter jurisdiction.

2. We have read the affidavits of Mr. Mukasa and Mr. Weche which were submitted in support of the defendant's motion to dismiss.

3. On April 18, 1972, we were on board the subject aircraft which was being operated by the defendant and which crashed during its take-off run at the Haile Salassie I International Airport, Addis Ababa, Ethiopia.

4. That as a result of said crash, we both suffered severe personal injuries which are permanent in nature.

5. In mid-March of 1972 we began our preparations to depart Nairobi, Kenya for New York. At that time, we noticed an advertisement in a local paper for charter flights to New York and London which referred us to E. A. Sun, Sea, Safari, a travel agency located in Nairobi. We visited E. A. Sun, Sea, Safari and inquired about two tickets to New York and were advised that the charter flights went to London and then a different charter aircraft would be used for the London to New York leg of the journey. In view of that, we were advised, by an employee of E. A. Sun, Sea, Safari, not to purchase the ticket to New York until our arrival in London since our charter from Nairobi could be delayed and we would lose our money if we did not make the connecting flight. At the same time, the employee assured

Exhibit 1, Attached to Affidavit of Milton G. Sincoff

us that we could pay for the London-New York leg of the journey at the E. A. Sun, Sea, Safari office located in London. Having flown charter status before, this arrangement did not seem out of the ordinary to us.

6. After several subsequent visits to the E. A. Sun, Sea, Safari office in Nairobi, we were finally advised that we would be booked on a flight operated by East African Airways. At that time, we were again advised that we should pay for the London-New York leg of our journey home at the E. A. Sun, Sea, Safari office in London.

7. Finally on April 17, 1972, after several East African Airways flights from Nairobi had been cancelled because of maintenance problems, we were advised by E. A. Sun, Sea, Safari that our flight would be departing Nairobi on April 18, 1972. Our tickets for that flight were delivered to us by E. A. Sun, Sea, Safari on April 17, 1972.

8. All arrangements for our journey home to New York from Nairobi were handled for us by E. A. Sun, Sea, Safari travel agency. Contrary to the statement in Mr. Edward S. Mukasa, in his affidavit, dated January 22, 1974, at paragraph 8, our tickets on the flight in question were issued and delivered to us by E. A. Sun, Sea, Safari. At no time during the arrangement of our trip home to New York did we deal directly with East African Airways.

(Sworn to by Peter F. Fay and Sharon L. Fay, March 28, 1974.)

55a

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF--
CANCELLED CHECK.

01 172-196
17 March 72
Peter F. Fay
TUES. 1972
THIS FACSIMILE IS FOR REFERENCE
ONLY AND IS NOT NEGOTIABLE
Peter F. Fay
SEALED SAFELY LTD.
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NAIROBI
131872
KENYA
KENYA
REVENUE
-030
250000-67

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

E.A. SUN, SEA & SAFARI

Hussein Suleman Road, P.O. Box 20393, NAIROBI

Phone: 29488

N^o 10982

Date 17/3/72

RECEIVED from MR Peter F. Fay

Address c/o city lodge

Sum of Three hundred & fifty dollars only

in payment of

Deposit/Full Payment

Balance of Payment

Deposit NRB / Lon Cneway
April

Names of passengers and addresses:

Mr. P. F. Fay

Mrs. Sharon Lynn Fay

Shs. 350/-

Dollars

Cheque No.

Cash

Travelers Cheq

With Thanks



RECEIPT OF PAYMENT IS NOT THE CONFIRMATION OF THE SEAT OR TOUR.

London Office: 62, Blanford Street, London W.1.

Tel. 01.935.5075/5081.

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF
WASHINGTON, D. C.

CIVIL AERONAUTICS BOARD

CERTIFICATION

I HEREBY CERTIFY *that the annexed* ^{are} ~~is a~~ ^{copies} ~~copy of~~ ^{the} ~~the~~

Opinion, Order (70-12-25), and Recommended Decision
issued to East African Airways Corporation. The Order
was approved by the President of the United States on
December 3, 1970,

file in this Board.

IN WITNESS WHEREOF, I have hereunto sub-
scribed my name, and caused the seal
of the Civil Aeronautics Board to be
affixed this 27th day of February
one thousand nine hundred and seventy-three.

Phillip T. Kauder
Acting Secretary
CIVIL AERONAUTICS BOARD

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eral Aviation Act (49 U.S.C. 1324(d)) provides in pertinent part that "[a] publication purporting to
be competent evidence of the orders, decisions, rules, regulations, and reports of the Board shall
be without further proof or authentication in the courts", and Section 1403, 49 U.S.C. 1503 provides
with the Board shall be preserved as public records in the custody of the secretary of the Board,
evidence of what they purport to be in all judicial proceedings, and that "copies of, and extracts
the secretary of the Board, under the seal of the Board, shall be received in evidence with like effect

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Issued pursuant to
Order 70-12-5

PERMIT TO FOREIGN AIR CARRIER

EAST AFRICAN AIRWAYS CORPORATION

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, as follows:

Between a point or points in the Republic of Kenya, a point or points in the United Republic of Tanzania, and a point or points in the Republic of Uganda; intermediate points in Ethiopia, Sudan, the United Arab Republic, the Canary Islands, Greece, Italy, Switzerland, France, the Federal Republic of Germany, Denmark, and the United Kingdom; and the terminal point New York, New York.

The holder shall be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

The holder shall conform to the airworthiness and airman competency requirements prescribed for international air services by the Governments of the Republic of Kenya, the United Republic of Tanzania, and the Republic of Uganda (hereinafter referred to as the member countries of the East African Community).

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and any or all of the member countries of the East African Community shall be parties.

The exercise of the privileges granted hereby shall be subject to (a) the condition that East African Airways Corporation shall submit to the Board a true copy of each amendment to the Treaty for East African Cooperation, entered into on June 5, 1967, and to the East African Airways Corporation Act of 1967, which relates to air transportation, and

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

- 2 -

(b) such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be subject to the condition that in the event any practice develops which the Board regards as inimical to sound economic conditions, the holder and the Board will consult with respect thereto and will use their best efforts to agree upon modifications thereof satisfactory to the Board and the holder.

The holder shall keep on deposit with the Board a signed counterpart of CAB Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-25680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The holder (1) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of \$1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (2) shall not provide foreign air transportation with respect to persons unless there is in effect liability insurance sufficient to cover the obligations assumed in CAB Agreement 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.

By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

This permit shall be effective on December 3, 1970, and, subject to the terms hereinafter set forth, shall terminate two years thereafter. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating a route substantially comparable to the route described herein; (2) upon the effective date of any permit granted by the Board to any other carrier designated by any or all of the member countries of the East African Community in lieu

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

.. 3 .

of the holder hereof; or (3) upon the cancellation or termination of the Treaty for East African Cooperation: Provided, however, That if the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and all of the member countries of the East African Community are or shall become parties, then and in that event this permit is continued in effect during the period provided in such treaty, convention, or agreement.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 28th day of October, 1970.

MARSH J. ZINK

Secretary

(SEAL)

Issuance of this permit to
the holder approved by the
President of the United States
on December 3, 1970
in Order 70-12-25.

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

73-5-140

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Served: May 31, 1973

DOCKET 24679

EAST AFRICAN AIRWAYS CORPORATION

Decided: May 4, 1973

Foreign air carrier permit held by East African Airways Corporation authorizing the carrier (a) to engage in foreign air transportation with respect to persons, property and mail between a point or points in the Republic of Kenya, a point or points in the United Republic of Tanzania, and a point or points in the Republic of Uganda; intermediate points in Ethiopia, Sudan, the United Arab Republic, the Canary Islands, Greece, Italy, Switzerland, France, the Federal Republic of Germany, Denmark, and the United Kingdom; and the terminal point New York, New York; and (b) to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations, renewed for a three-year period, subject to conditions.

APPEARANCES:

Same as in the recommended decision.

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF
OPINION

BY THE BOARD:

In this proceeding, East African Airways Corporation, an air carrier of the East African Community whose member states are the Republic of Kenya, the United Republic of Tanzania, and the Republic of Uganda, seeks renewal of its foreign air carrier permit (Order 70-12-25, approved December 3, 1970, Docket 22381), authorizing the applicant (a) to engage in foreign air transportation with respect to persons, property, and mail between a point or points in the Republic of Kenya, a point or points in the United Republic of Tanzania, and a point or points in the Republic of Uganda; intermediate points in Ethiopia, Sudan, the United Arab Republic, the Canary Islands, Greece, Italy, Switzerland, France, the Federal Republic of Germany, Denmark, and the United Kingdom; and the terminal point New York, New York. and (b) to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

Following a public hearing, Administrative Law Judge Henry Whitehouse issued his decision recommending that the applicant be granted a renewal of its foreign air carrier permit for a period of three years. No exceptions have been filed.

Upon consideration of the record, the Board has decided to adopt as its own the Administrative Law Judge's recommended decision which is attached hereto as an appendix.

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

- 2 -

In view of the foregoing and all the facts of record, the Board finds:

1. That it is in the public interest to renew the foreign air carrier permit held by East African Airways Corporation for a period of three years, authorizing the carrier (a) to engage in foreign air transportation with respect to persons, property, and mail between a point or points in the Republic of Kenya, a point or points in the United Republic of Tanzania, and a point or points in the Republic of Uganda; intermediate points in Ethiopia, Sudan, the United Arab Republic, the Canary Islands, Greece, Italy, Switzerland, France, the Federal Republic of Germany, Denmark, and the United Kingdom; and the terminal point New York, New York, and (c) to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

2. That the public interest requires that the exercise of the privileges granted by said permit shall be subject to the terms, conditions, and limitations contained in the form of permit attached to the accompanying order, and to such other reasonable terms, conditions and limitations required by the public interest as may from time to time be prescribed by the Board.

3. That East African Airways Corporation is fit, willing, and able properly to perform the above-described foreign air transportation and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder.

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

.. 3 .

4. That, except to the extent granted, the application of East African Airways Corporation, and all other requests herein, should be denied.

An appropriate order will be entered.

TIMM, Chairman, GILMANAND, Vice Chairman, MINETTI and MURPHY, Members of the Board, concurred in the above opinion.

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

Order 73-5-140

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 4th day of May, 1973

Application of

EAST AFRICAN AIRWAYS CORPORATION

Docket 24679

for renewal of its foreign air
carrier permit pursuant to section
402 of the Federal Aviation Act of
1958.

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision;

IT IS ORDERED:

1. That an amended foreign air carrier permit in the form attached hereto be issued to East African Airways Corporation;
2. That said permit shall be signed on behalf of the Board by its Secretary, shall have affixed thereto the seal of the Board, and shall be effective upon the effective date of this order;
3. That, except to the extent granted herein, the application of East African Airways Corporation, and all other requests in this proceeding, be and they hereby are denied; and

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

- 2 -

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4. That this order shall become effective upon the date of its approval by the President of the United States.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SF&L)

THE WHITE HOUSE

APPROVED:

RICHARD NIXON _____

May 29, 1973 _____

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

Issued pursuant to
Order 73-5-140

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

PERMIT TO FOREIGN AIR CARRIER
(as amended)

EAST AFRICAN AIRWAYS CORPORATION

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, as follows:

Between a point or points in the Republic of Kenya, a point or points in the United Republic of Tanzania, and a point or points in the Republic of Uganda; intermediate points in Ethiopia, Sudan, the United Arab Republic, the Canary Islands, Greece, Italy, Switzerland, France, the Federal Republic of Germany, Denmark, and the United Kingdom; and the terminal point New York, New York.

The holder shall be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

The holder shall conform to the airworthiness and airman competency requirements prescribed for international air services by the Governments of the Republic of Kenya, the United Republic of Tanzania, and the Republic of Uganda (hereinafter referred to as the member countries of the East African Community).

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and any or all of the member countries of the East African Community shall be parties.

The exercise of the privileges granted hereby shall be subject to (a) the condition that East African Airways Corporation shall submit to the Board a true copy of each amendment to the Treaty for East African Cooperation, entered into on June 6, 1967, and to the East African Airways Corporation Act of 1967, which relates to air transportation, and

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

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(b) such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be subject to the condition that in the event any practice develops which the Board regards as inimical to sound economic conditions, the holder and the Board will consult with respect thereto and will use their best efforts to agree upon modifications thereof satisfactory to the Board and the holder.

The holder shall keep on deposit with the Board a signed counterpart of CAB Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The holder (1) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of \$1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (2) shall not provide foreign air transportation with respect to persons unless there is in effect liability insurance sufficient to cover the obligations assumed in CAB Agreement 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.

By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

This permit shall be effective on May 29, 1973, and, subject to the terms hereinafter set forth, shall terminate three years thereafter. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating a route substantially comparable to the route described herein; (2) upon the effective date of any permit granted by the Board to any carrier designated by any or all of the member countries of the East African Community in lieu of the holder hereof; or (3) upon the cancellation or termination of the

EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF

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Treaty for East African Cooperation: Provided, however, That if the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and all of the member countries of the East African Community are or shall become parties, then and in that event this permit is continued in effect during the period provided in such treaty, convention, or agreement.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 4th day of May, 1973.

I WILN Z. HOLLAND

Secretary

(SEAL)

Issuance of this permit to
the holder approved by the
President of the United States
on May 29, 1973,
in Order 73-5-140.

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EXHIBIT 2, ATTACHED TO AFFIDAVIT OF MILTON G. SINCOFF
APPENDIX

DOCKET 24679

THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION REFERRED TO
HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION
GIVEN AT THE TIME OF ITS RELEASE. THE RECOMMENDED DECISION IS ATTACHED
TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES IN
THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED
AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

District Court's Memorandum and Order on Motion to Dismiss.

OWEN, District Judge.

Defendant, East African Airways Corporation, moves for an order dismissing this action as to plaintiffs Peter and Sharon Fay for lack of subject matter jurisdiction pursuant to Rule 12(b) (1) and 12(h) (3) Fed. R. Civ. P. The motion is granted.

Plaintiffs do not dispute, and indeed there can be no doubt, that this action is governed by Article 28 (1) of the Warsaw Convention, 49 U.S.C. §1502 (1971), 49 Stat. 3000 which provides in pertinent part that:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of domicile of the carrier or his principal place of business or where he has a place of business through which the contract has been made, or before the court at the place of destination.

Plaintiffs' suit is maintainable against East African Airways only if one of the four forums enumerated in Article 28(1) is in the United States. Only as to "place of destination" is there any dispute between the parties; the other three forums are conceded not to be in the United States.

Plaintiffs urge that the "place of destination" of their trip was New York, the defendant contends it was London. The facts reveal that plaintiffs purchased their air tickets from E. A. Sun, Sea and Safari, a travel agency in Nairobi, Kenya. While they originally requested two tickets providing them with passage from Nairobi to London and thence from London to New York, plaintiffs were instead told by the travel agency that they could only purchase a ticket from Nairobi to London but upon their arrival in London could purchase the additional ticket to New York from a branch office. The Fays argue from this factual circumstance that the travel agency

*District Court's Memorandum and Order on Motion to
Dismiss*

knew their ultimate destination to be New York, and were acting as the agent for East African Airways when they sold plaintiffs their tickets. Defendants dispute this, arguing that the travel agency was not an agent of East African Airways but was in fact acting on behalf of the Fays.

In any event, the Court need not concern itself with who was acting as agent for whom. The fact is that E. A. Sun, Sea and Safari in Kenya was unable to sell plaintiffs a ticket to New York and could only provide them with passage to London. Although plaintiffs intended to continue their journey on to New York from London, this fact was not evidenced in the contract of carriage in which London is specified as the place of destination. Thus, further consideration by this Court is precluded. See *Smith v. Canadian Pacific Airways, Ltd.*, 452 F. 2d 798, 802 (2d Cir. 1971); *Grey v. American Airlines, Inc.*, 95 F. Supp. 756, 757 (S.D.N.Y. 1950), aff'd 227 F. 2d 282 (2d Cir. 1955), cert. denied 350 U. S. 989 (1956); *Parkinson v. Canadian Pacific Airlines, Ltd.*, 10 Av. Cas. 17,969 (S.D.N.Y. 1968), McKenry, *Judicial Jurisdiction under the Warsaw Convention*, 29 J. Air. L. & Com. 205 (1963). *Block v. Compagnie National Air France*, 386 F. 2d 323 (5th Cir. 1967), cert. denied 392 U. S. 905 (1968); *Krug v. British European Airways*, 73 Civ. 1333 (S.D.N.Y. 1973).

Neither of plaintiffs' two remaining arguments permit this court to exercise jurisdiction over the Fays' claim against East African Airways. It is well established in the law that Article 28(1) of the Warsaw Convention enumerates a rule of jurisdiction and not merely of venue. Therefore, the question of pendent or ancillary jurisdiction over the claims of the Fays cannot be considered unless the prerequisite of international or treaty jurisdiction is first satisfied. In the words of the leading case on this subject, *Smith v. Canadian Pacific Airways, Ltd.*, *supra*:

*District Court's Memorandum and Order on Motion to
Dismiss*

We therefore look to the Convention to determine its applicability here. Only if it does apply so as to permit of treaty jurisdiction need we answer domestic jurisdiction and venue questions. If treaty jurisdiction under the Convention does not lie, federal jurisdiction under 28 U.S.C. §1331(a), which permits cases arising under United States treaties, clearly cannot be established. Similarly, if the Convention precludes suit, our inquiry ceases without an examination of diversity jurisdiction under 28 U.S.C. §1332(a) (2); in other words, treaty provisions, being of equal constitutional status, may operate under article VI of the Federal Constitution as limitations on diversity jurisdiction, just as the requirements of jurisdictional amount may so operate.

Similarly, plaintiff's argument that Article 28(1) of the Convention unconstitutionally deprives them of the right to litigate in the Federal Courts must fail. The jurisdiction of the Federal Courts extends only as far as Congress permits, which in some cases is less than the limits of the federal jurisdictional power as set forth in Article III of the Federal Constitution. *Sheldon v. Sill*, 49 U. S. 441 (1850); *Jaconski v. Avisun Corp.*, 359 F. 2d 931 (3d Cir. 1966); *Glidden Co. v. Zdanok*, 370 U. S. 530 (1962). As a treaty provision having the force and effect of the domestic laws of the United States, Article 28(1) of the Warsaw Convention may and does constitutionally restrict the subject matter jurisdiction of this Court.

For all the above reasons the defendant's motion to dismiss for lack of treaty jurisdiction is granted.

It is so ordered.

October 16, 1974.

RICHARD OWEN
United States District Judge

Notice of Appeal.

Notice is hereby given that plaintiffs Sharon and Peter Fay hereby appeal to the United States Court of Appeals for the Second Circuit from the Order entered by the Honorable Richard Owen, United States District Judge, on October 16, 1974, which granted the defendant East African Airways Corporation's motion to dismiss for lack of subject matter jurisdiction.

Dated: New York, New York
November 14, 1974

KREINDLER & KREINDLER

Attorneys for the Plaintiffs

By /s/ MELVIN I. FRIEDMAN

A Member of the Firm

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Attorneys for Defendant

East African Airways Corp.

United States Court of Appeals
For the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

James L. McCarthy, Hubert McCarthy, Peter F. Fay
and Sharon L. Fay

Plaintiffs

Sharon L. and Peter F. Fay

Plaintiffs-Appellants

against

East African Airways Corporation, British
Aircraft Corporation, et al.

Defendants

East African Airways Corporation
Defendant-Appellee

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF New York, ss:

Raymond J. Braddick agent for James J. Sullivan Esq. being duly sworn,

deposes and says that he is over the age of 21 years and resides at
Levittown, New York

That on the 17th. day of March, 1975 at
1251 Avenue of the Americas New York, New York
he served the annexed Brief and Appendix upon
Condon & Forsyth Esqs.

in this action, by delivering to and leaving with said attorneys 3 true copies thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 17th.

day of March 1975 }

Raymond J. Braddick

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975